STATE OF MICHIGAN
IN THE SUPREME COURT

ON APPEAL FROM THE COURT OF APPEALS
Meter, P.J., and Talbot and Murray, JJ.

PEOPLE OF THE STATE OF MICHIGAN
Plaintiff-Appellant,

v

JOSEPH MILLER **No. 149502**
Defendant-Appellee.

L.C. 12-1777-FH
COA No. 314375

BRIEF OF THE PROSECUTING ATTORNEYS ASSOCIATION OF MICHIGAN AS AMICUS CURIAE IN SUPPORT OF THE PEOPLE OF THE STATE OF MICHIGAN

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A defendant may not receive more punishment at one trial than authorized by the legislature. There is no constitutionally required test for ascertaining the intent of the legislature. Is convicting and sentencing a defendant for a violation of MCL § 257.625(1) and also under MCL § 257.625(5) for a violation of paragraph (1) causing serious impairment of a body function of another person under paragraph (5) authorized by the legislature?

Amicus answers: YES

Statement of Facts

Amicus adopts the statement of facts of the People, appellant.

Argument

I

A defendant may not receive more punishment at one trial than authorized by the legislature. There is no constitutionally required test for ascertaining the intent of the legislature. Convicting and sentencing a defendant for a violation of MCL § 257.625(1) and also under MCL § 257.625(5) for a violation of paragraph (1) causing serious impairment of a body function of another person under paragraph (5) is authorized by the legislature.

A. Introduction

1. Questions presented in the grant of leave

In its order granting leave to appeal this court directed that the parties address:

- whether the state and federal Double Jeopardy Clauses, U.S. Const., Am. V, and Const. 1963, art. 1, § 15, prohibit punishment for both the compound offense of Operating While Intoxicated (OWI) causing serious injury, MCL 257.625(5), and its predicate offense of OWI, MCL 257.625(1) and (9)(a), where both the compound and predicate offenses have alternative elements. Compare People v. Ream, 481 Mich. 223, 750 N.W.2d 536 (2008), with United States v. Dixon, 509 U.S. 688, 113 S.Ct. 2849, 125 L.Ed.2d 556 (1993), and People v. Wilder, 485 Mich. 35, 780 N.W.2d 265 (2010).

- whether the existence of prior convictions under MCL 257.625(9)(c) amounts to an element of OWI causing serious injury for purposes of the state and federal Double Jeopardy Clauses and, accordingly,

- whether punishment for both third-offense OWI, MCL 257.625(9)(c), and OWI causing serious injury amounts to impermissible multiple punishment under the Double Jeopardy Clauses, or whether each offense has an element that the other does not.[1]

[1] *People v. Miller,* 854 N.W.2d 715, 716 (2014).

Amicus believes, however, that this is not a double jeopardy case, but one involving due process, though one takes the same train to get to the destination, that being the ascertainment of the intent of the legislature. But for this question even to arise, defendant must be suffering "multiple punishment" from his convictions at trial.

2. Defendant is not suffering multiple punishment from his two convictions

The judgment of sentence shows that for each conviction defendant was sentenced to five years probation, with the first nine months to be served in county jail. No cumulative [consecutive] punishment was authorized or imposed, and so the question is whether the fact of the second conviction itself—its possible collateral consequences—constitutes multiple punishment.[2]

The United States Supreme Court has said that where the legislature has *not* authorized multiple punishments, a "second conviction, whose concomitant sentence is served concurrently, does not evaporate simply because of the concurrence of the sentence. The separate conviction, apart from the concurrent sentence, has potential adverse collateral consequences that may not be ignored. For example, the presence of two convictions on the record may delay the defendant's

[2] According to the judgment of sentence, defendant received one assessment of $130 under the Crime Victim's Assessment requirement, MCL § 750.905; the fact of two convictions did not enhance this amount in any way (and is not punitive in any event). Defendant received a fine of $500.00. Because under paragraph (5) a fine, if imposed, must be for no less than $1000.00, the fine of $500.00 was clearly imposed only for the conviction under paragraph (1), where the minimum fine is $500.00 under paragraph (9)(c) for a third offender. Defendant also received a "state minimum" assessment of $136.00 under MCL § 769.1j. The minimum assessment under the statute is $68.00, so that it appears that the there was an assessment for each conviction. This assessment is specifically denominated as "costs," ("the court shall order shall order that the person pay costs of not less than the following amount, if applicable"). An assessment of this sort for costs simply does not constitute punishment at all, and so cannot suffice as supplying the "multiple" punishment alleged here. See *People v. Earl*, 495 Mich. 33 (2014).

eligibility for parole or result in an increased sentence under a recidivist statute for a future offense."[3] These collateral consequences appear not to exist here. Paragraph (27) of the statute, MCL § 257.625(27), provides that "If 2 or more convictions described in subsection (25) are convictions for violations arising out of the same transaction, *only 1 conviction shall be used to determine whether the person has a prior conviction*" (emphasis supplied). The convictions described in paragraph (25) include "a violation or attempted violation of any of the following: (A) *This section*, except a violation of subsection (2)" (emphasis supplied), and paragraph (2) does not concern one of the convictions here.[4] And so defendant's two convictions are to be considered as 1 conviction in a determination of whether he has a prior conviction.[5] There appears, then, to be no cognizable "multiple punishment" in this case.

3. The so-called "multiple punishment" component of the jeopardy clause does not exist apart from successive prosecutions

Because the so-called "multiple punishment" aspect of jeopardy turns on legislative intent—that is, no punishment beyond that authorized by the legislature is permitted[6]—to call

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[3] *Ball v. United States*, 470 US 856, 864-865, 105 S Ct 1668, 1673, 84 L Ed 2d 740 (1985).

[4] That paragraph concerns authorizing the use of a vehicle by one who is intoxicated, impaired, etc.

[5] As amicus will later explore, this provision is also strong evidence that the legislature contemplated and thereby authorized multiple convictions arising out of a single transaction, contrary to the conclusion of the Court of Appeals.

[6] See *People v. Sturgis*, 427 Mich. 392, 400 (1986): "By contrast [to the heart of the double jeopardy protection, successive prosecutions], the constitutional protection against multiple punishment is a restriction on a court's ability to impose punishment in excess of legislative intent. . . . Judicial examination of the scope of double jeopardy protection against imposed multiple punishment for the 'same offense' is confined to a determination of legislative intent. . . . the core double jeopardy right to be free from vexatious proceedings is simply not

multiple convictions at one proceeding "multiple punishment" under the jeopardy clause makes little sense. What could be more a violation of due process than to punish someone more than the law allows? Indeed, the United States Supreme Court has held that the "multiple punishment" component of jeopardy does not exist outside of successive prosecutions. In *Hudson v United States* the Court said that "The Clause protects only against the imposition of multiple criminal punishments for the same offense, . . . *and then only when such occurs in successive proceedings*."[7] And Justice Scalia observed, concurring, that "Today's opinion uses a somewhat different bottle than I would, returning the law to its state immediately prior to *Halper*—which acknowledged a constitutional prohibition of multiple punishments *but required successive criminal prosecutions.*"[8] Due process is certainly adequate for the task here. As Justice Scalia said dissenting in *Department of Revenue of Montana v. Kurth Ranch*, "the guarantee of the process provided by the law of the land, . . . assures prior legislative

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present, . . . Since the power to define crime and fix punishment is wholly legislative, the clause is not a limitation on the Legislature, . . . and the only interest of the defendant is in not having more punishment imposed than intended by the Legislature . . . *Thus, '[e]ven if the crimes are the same, ... if it is evident that a state legislature intended to authorize cumulative punishments, a court's inquiry is at an end*'" (citations omitted; emphasis supplied).

[7] *Hudson v. United States,* 522 U.S. 93, 99, 118 S.Ct. 488, 493, 139 L Ed 2d 450 (1997) (emphasis supplied).

[8] *Hudson*, 118 S.Ct. at 497 (Scalia, J., concurring)(emphasis supplied). See also *United States v. Van Waeyenberghe*, 481 F.3d 951, 958 (CA 7, 2007) ("The Double Jeopardy Clause protects only against multiple criminal punishments meted out in successive proceedings"); *Nivens v. Gilchrist*, 319 F.3d 151, 153 (CA 4, 2003) ("The Court has also concluded that the Double Jeopardy Clause protects individuals from the imposition of 'multiple criminal punishments for the same offense,' but 'only when such occurs in successive proceedings'"); *United State v. Hatchett,* 245 F.3d 625, 630 (CA 7, 2001) ("The Supreme Court has made clear, however, that the Double Jeopardy Clause proscribes multiple punishments for a single offense only when those punishments are imposed in successive proceedings").

authorization for whatever punishment is imposed."[9] It is the legislative intent question that remains, and the *Blockburger/Smith*[10] test provides the initial tool for discerning that intent, presuming the authorization of multiple convictions where the offenses are not the "same offense"; that is, where each offense requires proof of an element the other does not.

4. The approach of the amicus

The People take the approach that *People v Ream*[11] provides that where an offense has alternative elements, the *Smith/Blockburger* test is applied by viewing the elements in the aggregate. So viewed, it is not *necessary*, then, to proving an "OWI" [to use the shorthand for simplicity's sake] causing a serious impairment of a body function that the operator of the vehicle be shown to have been intoxicated under paragraph (1) of the statute, for the offense can also be shown where a person's ability to operate is visibly impaired under paragraph (3), and can also be shown where the operator has in his or her body any amount of a controlled substance listed in schedule 1 under paragraph (8). This is no different than *Ream*, where the defendant was convicted of both 1st-degree murder/murder during the perpetration of a criminal sexual conduct in the 1st-degree, and criminal sexual conduct in the 1st-degree, this Court finding that the offenses were not the "same" because 1st-degree murder/during the perpetration of an enumerated felony *can* be committed through proof of a number of other felonies, criminal sexual conduct in the 1st-degree not being the exclusive means of proof.

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[9] *Department of Revenue of Montana v. Kurth Ranch,* 511 U.S. 767, 799, 114 S.Ct. 1937, 1956, 128 L Ed 2d 767 (1994) (Scalia, J., dissenting) (abrogation of *Kurth Ranch* by *Hudson* recognized in *United States v. Warneke*, 199 F.3d 906, 908 (CA 7, 1999).

[10] See *People v Smith*, 478 Mich 292 (2007).

[11] *People v Ream*, 481 Mich 223 (2008).

Defendant, on the other hand, takes the view that while it is the elements that must be viewed, it is the elements that are involved in the *particular* case—the particular charge brought—and so, though "OWI" causing a serious impairment of a body function *can* be committed where a person's ability to operate is visibly impaired under paragraph (3) rather than the person being intoxicated under paragraph (1), and *can* be committed where the operator has in his or her body any amount of a controlled substance listed in schedule 1 under paragraph (8), it not being necessary for proof of OWI causing a serious impairment of a body function that the operator was intoxicated—in *this* case paragraph (1) was charged as the basis of the conduct for the offense described in paragraph (5), and its elements are subsumed in the paragraph (5) charge, so that it is the "same offense." Both defendant and his supporting amicus call for the overruling of *Ream*, defendant also making several subsidiary arguments.[12]

Amicus will argue that the multiple punishment question is entirely one of legislative intent (and is a due process question); that compound offenses are a particular species of offense in terms of the application of the *Smith/Blockburger* test; that *People v Ream* should not be overruled; that the present case does not involve a compound offense, and multiple punishment is authorized in the present case (though amicus argues that defendant is not suffering multiple punishment).

[12] Defendant's additional principal argument is that *Ream* is distinguishable from the present case as the MCL § 750.316 refers to offenses outside itself, while MCL § 257.625 is self-contained.

B. The multiple punishment question is *entirely* one of legislative intent, and a State's conclusion on that question is final; only if a State found that punishment was being imposed beyond that intended by the legislature and *upheld* that punishment could any constitutional violation arise

1. Clearing away the underbrush

First, principles concerning the heart or core of the jeopardy protection fundamentally differ from those concerning the so-called "multiple punishment" component, which amicus has argued is actually a question of due process, rather than one of jeopardy. Successive prosecution cases are of little utility outside of that context, and *Illinois v Vitale*,[13] *Harris v Oklahoma*,[14] and *United States v Dixon*,[15] relied on by the defendant, are all successive prosecution cases. As Justice Boyle said for the Court in the *Sturgis* case, quoting from *People v Wakeford,*[16] "It is . . . clear that *'the term 'same offense' has a different and broader meaning in a case involving a subsequent prosecution than it does . . . . where multiple punishments [are] imposed during a single trial."*[17] Amicus has no doubt that one cannot be *successively* prosecuted for 1st-degree murder/during the perpetration of a specific enumerated felony, and for that specific enumerated felony,[18] even if the legislature were to somehow specifically indicate its intention to so allow.

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[13] *Illinois v Vitale*, 447 US 410, 100 S Ct 2260, 65 L Ed 2d 228 (1980).

[14] *Harris v Oklahoma*, 433 US 682, 97 S Ct 2912, 53 L Ed 2d 1054 (1977). *Payne v Virginia*, 468 U.S. 1062, 104 S.Ct. 3573, 82 L Ed 2d 801 (1984), cited by the amicus, is simply a per curiam application of *Harris* in an indistinguishable successive prosecution case.

[15] *United States v Dixon*, 509 US 688, 113 S.Ct. 2849,125 L Ed 2d 556 (1993).

[16] *People v Wakeford,* 418 Mich 95, 104; 341 NW2d 68 (1983).

[17] *Sturgis*, 427 Mich at 399 (emphasis supplied).

[18] See *Lewis v. United States*, 523 U.S. 155, 177, 118 S.Ct. 1135, 1147, 140 L Ed 2d 271 (1998) (Scalia, J., concurring) ("double jeopardy law treats greater and lesser included offenses

Not so with the question of whether multiple punishment in a given prosecution exceeds the authorization of the legislature. While the question of legislative authorization is irrelevant in the successive prosecution situation, it is *everything* in the punishment context, for *the legislature is free to punish the same offense twice in one trial*, as recognized by this Court:

> By contrast [to the heart of the double jeopardy protection, successive prosecutions], the constitutional protection against multiple punishment is a restriction on a court's ability to impose punishment in excess of legislative intent. . . . Judicial examination of the scope of double jeopardy protection against imposed multiple punishment for the 'same offense' is confined to a determination of legislative intent. . . . the core double jeopardy right to be free from vexatious proceedings is simply not present, . . . Since the power to define crime and fix punishment is wholly legislative, the clause is not a limitation on the Legislature, . . . and the only interest of the defendant is in not having more punishment imposed than intended by the Legislature . . . *Thus, "[e]ven if the crimes are the same, ... if it is evident that a state legislature intended to authorize cumulative punishments, a court's inquiry is at an end*."[19]

Defendant and his supporting amicus assume that if *Blockburger* applies to the elements "in play" where the offense involved has alternative elements, and that if in so applying *Blockburger* the offenses are the "same," then permitting multiple punishment[20] violates the federal constitution. But if the legislature has authorized that punishment, *the punishment does not violate the constitution, irrespective of Blockburger*. The question is *always* one of legislative

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as the same, see, e.g., *Harris v. Oklahoma*, 433 U.S. 682, 97 S.Ct. 2912, 53 L.Ed.2d 1054 (1977) (per curiam), so that a person tried for felony murder cannot subsequently be prosecuted for the armed robbery that constituted the charged felony").

[19] See *People v. Sturgis*, 427 Mich at 400 (emphasis supplied), quoting *Ohio v. Johnson*, 467 US 493, 499, n. 8, 104 S Ct 2536, 2541, n. 8, 81 L.Ed.2d 425 (1984).

[20] And again, amicus has argued that in any event no multiple punishment occurred in the present case.

authorization, and the State, as a matter of constitutional law, is free to consider that question by application of *Blockburger*, modification of *Blockburger's* test, or in whatever fashion it deems responsible and appropriate.

There simply is no constitutional test for determining the legislatively authorized punishment, there is only a prohibition against permitting punishment that exceeds that authorization, however determined.

Second, defendant's contention that paragraphs (1), (3), and (8) of the statute "all share the element of intoxication" is untenable in view of the text. Only paragraph (1) requires proof of intoxication, which it defines in three alternative ways. Defendant argues that "visible impairment" is simply another way of showing intoxication ["the prosecutor may use visible impairment to meet his burden of proving intoxication; he is not excused from proving that element."] But paragraph (3) is not a part of the definitional section of paragraph (1), and if the legislature intended visible impairment to constitute intoxication it would have included it there. Paragraph (3) creates *another* and separate offense, operating a vehicle while the ability to operate is visibly impaired from the use of alcohol, a controlled substance, or both. Visible impairment does not require proof of intoxication as defined in paragraph (1).[21] And the claim that paragraph (8) requires proof of intoxication is also contrary to the text, which contains no requirement of either intoxication or impaired driving. If one operates a motor vehicle while he or she has "in his or her body *any amount* of a controlled substance listed in schedule 1" the

[21] Compare M Crim JI 15.3 and 15.4.

crime is made out, whether that amount has caused impaired driving or "hallucinogenic or euphoric effects"[22] or not.

Before proceeding to the question of legislative authorization, amicus believes it is necessary to define terms, something that is surprisingly vexing here.

2. Defining terms: what constitutes a "compound offense"?

This Court's order describes Operating While Intoxicated (OWI) causing serious injury, MCL § 257.625(5), as a "compound offense," and refers to OWI, MCL § 257.625(1) and (9)(a), as "its predicate offense." This seems to amicus an unusual use of the term "compound offense." Simplifying,[23] paragraph (1) prohibits operating a motor vehicle while intoxicated, with three alternative statutory definitions of "operating while intoxicated" provided.[24] Paragraph (5) provides that one who violates paragraph (1), or (3), or (8)], "and by the operation of that motor vehicle causes a serious impairment of a body function of another person is guilty of a crime. . . ."[25] This Court has to date used the term "compound offense" only when referring to an offense

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[22] See M Crim JI 15.3.

[23] Amicus will turn to the actual text of the statute subsequently.

[24] Paragraph (9)(a) is the penalty provision for violations of paragraphs (1) through (8).

[25] The penalty for the offense is that "(a) Except as provided in subdivision (b), the person is guilty of a felony punishable by imprisonment for not more than 5 years or a fine of not less than $1,000.00 or more than $5,000.00, or both. The judgment of sentence may impose the sanction permitted under section 625n. If the vehicle is not ordered forfeited under section 625n, the court shall order vehicle immobilization under section 904d in the judgment of sentence," and the penalty is greater under subsection (b), "If the violation occurs while the person has an alcohol content of 0.17 grams or more per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine, and within 7 years of a prior conviction, the person is guilty of a felony punishable by imprisonment for not more than 10 years or a fine of not less than $1,000.00 or more than $5,000.00, or both. The judgment of sentence may impose the sanction permitted under section 625n. If the vehicle is not ordered forfeited under section 625n, the court shall

established when "stand-alone" offenses are joined legislatively to form an aggravated offense, such as 1st-degree murder,[26] where murder is committed in the perpetration of an enumerated felony, or 1st-degree criminal sexual conduct,[27] where criminal sexual conduct is committed under circumstances involving the commission of any other felony.[28] This usage appears consistent with that in other jurisdictions.[29]

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order vehicle immobilization under section 904d in the judgment of sentence." Subsection (b) is not applicable in the present case.

[26] MCL § 750.316,

[27] MCL § 750.520b.

[28] This Court's has used the term "compound offense" or "compound crime" with regard to 1st-degree felony murder, see *People v. Wilson,* 496 Mich. 91 (2014); *People v. Ream,* 481 Mich. 223 (2008); *People v. Smith*, 478 Mich. 292 (2007); *People v. Garcia* , 448 Mich. 442 (1995); *People v. Goss,* 446 Mich. 587 (1994), and 1st-degree criminal sexual conduct/under circumstances involving the commission of any other felony. *People v. Robideau*, 419 Mich. 458 (1984). See also *People v. Martin*, 271 Mich.App. 280, 295 ff (2006), using the terms "predicate offense" and "predicate-based offense" in concluding that convictions for both a RICO offense and a predicate offense were permissible.

[29] See e.g. *Stinson v. State* 611 S.E.2d 52 (Ga.,2005) (felony murder a compound offense); *Wright v. State,* 953 A.2d 188 (Del.Supr.,2008); *State v. Goins*, 54 P.3d 723, 727 (Wash.App. Div. 1,2002) ("' compound' crime has been described as a crime piggybacking on top of another crime"). There are several anomalies. An old Texas case, *Driskill v. State,* 2 S.W. 622 (Tex.Ct.App. 1886) refers to an assault with intent to murder as "being a compound offense, composed of an assault coupled with the intent to murder." This is inconsistent with modern usage; there is no crime of "intent to murder," and so two crimes are not joined in the offense of assault with intent to murder. Also, a crime such as robbery *is* composed of two crimes—assault and larceny (or attempted larceny). See MCL § 750.530. But robbery represents, in Justice Ryan's words, a "continuum of culpability," the offenses "tied together by logic," rather than "tied together by the Legislature." *People v. Wilder,* 411 Mich. 328, 360 (1981)(Ryan, J., concurring). Robbery is, in essence, an egg with two yolks, where a compound offense, as spoken of modernly, is the joining of two eggs.

MCL § 257.625(5) is not a compound offense in this sense, nor is it a "predicate-based offense." It is, rather, an offense that is aggravated when certain consequences—a particular *harm*—results from the prohibited conduct, rather than aggravated by showing a more culpable intent or *mens rea.* Assault with intent to do great bodily harm is treated more seriously than assault, and assault with intent to murder more seriously than assault with intent to do great bodily harm, because of the more culpable mental state with which the defendant has acted, though it is quite possible that the actual consequence—the harm to the victim—in all three situations may be the same. The law punishes a more culpable *mens rea* more seriously. But just as the same result—such as a lack of harm—may occur to the victim in a situation where the law more severely punishes because of the mental state with which the defendant acted, the law may also punish more seriously acts done with the *identically* culpable mental state, based on the *harm* that result from the defendant's actions—though the defendant's *mens rea* is no more culpable, the law has also always punished consequences. In terms of levels of culpability, then, there are what might be called *"mens rea rea* crimes"; "consequence crimes"; a mixture of the two;[30] and "compound crimes," where punishment is elevated by the legislative joining of two crimes.

MCL § 257.625(5) is a "consequence crime," rather than a compound crime. There is no crime of "causing a serious impairment of a body function of another person" which is legislatively joined with the crime of OWI to create the offense of OWI causing a serious

[30] For example, the law punishes an assault with intent to murder more seriously than a simple assault because of the more culpable mental state. If that assault causes death, then because of that consequence, that harm, the offense is aggravated to murder, though the mental state of the actor is the same whether death results or not.

impairment of a body function of another person; rather, OWI causing a serious impairment of a body function of another person is a consequence crime, its gravamen being the *harm* caused by an act that is independently criminal, not the *mens rea* of the actor. This matters because ascertaining the intent of the legislature with regard to multiple convictions/punishment may well differ with regard to compound crimes as compared to consequence crimes and *mens rea* crimes.[31] *Ream* concerns compound offenses, and thus may well be beside the point here, though amicus will address it.

3. Ascertaining included offenses: People v Wilder [II][32]

This Court in its order granting leave referred to *People v Wilder*, an included-offense case. On the face of it, it would seem that ascertaining those offenses that are included within a charged offense—and thus are "inferior degrees"[33] of that offense—would be a relatively easy task. An offense is, this Court has held, included within another when it is a subset of the elements of the great offense.[34] And so one need only lay out the elements of the two offenses to determine whether the all elements of the supposed included offense are included within the greater offense, so that the lesser offense contains no element not within the greater offense.

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[31] No one would contend, for example, that where a lesser and greater crime are distinguished *only* on a more culpable *mens rea* conviction for both is permissible. A defendant could not be convicted and sentenced for both assault with intent to do great bodily harm and assault with intent to murder for the same assault.

[32] *People v. Wilder*, 485 Mich. 35 (2010), as distinguished from *People v. Wilder,* 411 Mich. 328 (1981).

[33] MCL § 768.32.

[34] An offense is not an "inferior degree" to a greater offense unless it "within a subset of the elements of the charged greater offense." *People v. Nyx*, 479 Mich. 112 (2007). And see *People v Cornell*, 466 Mich. 335 (2002).

But difficulty arises because of the modern trend of creating offenses with *alternative* elements. So, in determining whether something is an included offense—a subset of the elements of the greater offense—does one look at *all* of the elements of the two offenses, or only the alternative element(s) "in play" in the particular case? This Court has answered that it is the elements charged in the particular case that must be identified, laying aside those alternative elements not involved in the prosecution, before the assessment of whether another offense is a subset of the elements of the charged offense can be made:

> The Court of Appeals opined that third-degree home invasion cannot be a necessarily included lesser offense of first-degree home invasion because one or more of the possible alternative elements of third-degree home invasion are distinct from the elements of first-degree home invasion. In doing so, it failed to confine its analysis to the elements at issue in this case; rather, it based its decision on an analysis of alternative elements that were not at issue. . . .
>
> We conclude that a more narrowly focused evaluation of the statutory elements at issue is necessary when dealing with degreed offenses that can be committed by alternative methods. Such an evaluation requires examining the charged predicate crime to determine whether the alternative elements of the lesser crime committed are subsumed within the charged offense. As long as the elements at issue are subsumed within the charged offense, the crime is a necessarily included lesser offense. Not all possible statutory alternative elements of the lesser offense need to be subsumed within the elements of the greater offense in order to conclude that the lesser offense is a necessarily included lesser offense.[35]

Some jurisdictions take the same approach. For example, in the federal system, circuit courts of appeal have observed that where a lesser offense has alternative elements, "Congress could have enacted separate criminal statutes to reach" each of the alternatives and in that

[35] *People v. Wilder,* 485 Mich. 35, 44-45.

situation, that those separate statutes that are subsumed within a greater offense would be included offenses would be crystal clear. It would, then, be "'an unnecessary and formalistic requirement on how Congress drafts criminal statutes' to hold that the presence of alternative means of satisfying an element would preclude a statute from being a lesser-included offense."[36]

4. *Ream*, *Wilder*, and compound offenses

Amicus believes, as previously stated, that the present case does not involve a compound offense. This matters because compound offenses, joined legislatively, rather than logically on the basis of a continuum of culpability, present a special case; this Court has made its decision in *Ream* as to how *Blockburger* should be applied to compound offenses, and there is no reason for this Court to turn its face from *Ream*, whatever the Court decides with regard to the present case. Compound offenses, where two distinct offenses are joined, as Justice Ryan put it in *Wilder* (I), legislatively rather than logically, have always presented something of a puzzle when considering multiple punishment. Conviction and sentence on the predicate offense charged among a number of possible statutory alternatives will never constitute punishment beyond that authorized by the legislature if the *Blockburger* legislative intent presumption—does each offense require proof of an element the other does not—is applied to the statutory elements in the abstract or aggregate, for the compound offense does not require proof of any particular predicate. On the other hand,

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[36] *United States v. McCullough,* 348 F.3d 620, 626 (CA 7, 2003). See also *United States v. Alfisi*, 308 F.3d 144, 152 (CA 2, 2002); *Rutledge v. United States*, 517 U.S. 292, 300, 116 S.Ct. 1241, 134 L.Ed.2d 419 (1996).

See also Wayne R. LaFave, *Criminal Procedure*, § 24.8(b) at 1152–54 (4th ed. 2004): "When the lesser offense is one defined by statute as committed in several different ways, it is a lesser-included offense if the higher offense invariably includes at least one of these alternatives. Thus, because a premeditated first-degree murder necessarily includes an intentional murder, second-degree murder will be a lesser-included offense even though second-degree murder could also be committed through depraved indifference."

if the *Blockburger* presumption is applied to only the actual predicate offense charged, conviction and sentence for both the compound offense and the predicate will always constitute multiple punishment, absent some other legislative indication that multiple punishment is intended.

Courts have struggled with this question, and with ascertaining the meaning of the United States Supreme Court cases[37] on the question, and have reached different results.[38] And amicus

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[37] The statement in *Albernaz v. United States*, 450 U.S. 333, 343, 101 S.Ct. 1137, 1144, 67 L.Ed.2d 275, 284 (1981) that "[T]he decisional law in the [double jeopardy] area is a veritable Sargasso Sea which could not fail to challenge the most intrepid judicial navigator" remains true.

[38] Cf. *Swafford v. State,* 810 P.2d 1223, 1228 (N.M.,1991); *State v. Huff,* 802 N.W.2d 77, 96 (Neb.,2011); *Mack v. Commonwealth*, 136 S.W.3d 434, 438 (Ky.2004); *Games v. State,* 684 N.E.2d 466, 474 -477 (Ind.,1997) (receded from on state constitutional grounds, *Richardson v. State*, 717 N.E.2d 32 (Ind., 1999))("we . . . recognize that the United States Supreme Court's "same elements" test requires that we look only to the *statutory elements* of the offenses, *not to the charging information, the jury instructions outlining the elements of the crime, or the underlying proof needed to establish the elements"*)(final emphasis supplied); *Talancon v. State* 721 P.2d 764, 768 (Nev.,1986) ("we believe that [the legislature] sought to protect against two separate societal interests when it enacted the felony murder statute and the robbery statute. In essence, the robbery statute is intended to protect against robbery only, while the felony murder statute seeks to protect against homicides. In light of this intent to protect against two separate evils, we must conclude that the legislature intended two separate punishments when a defendant violates both statutes"). And see *Whalen v United States,* 445 U.S. 684, 702, 100 S.Ct. 1432, 1441, 63 L.Ed.2d 715 (1980) (Blackmun, J., concurring) ("The Court's holding today surely does not require that the same result automatically be reached in a State where the legislature enacts criminal sanctions clearly authorizing cumulative sentences for a defendant convicted on charges of felony murder and the underlying predicate felony. Nor does this Court's per curiam opinion in *Harris v. Oklahoma* .; . . holding that successive prosecutions for felony murder and the underlying predicate felony are constitutionally impermissible, require the States to reach an analogous result in a multiple punishments case. Unfortunately, the rather obvious holding in *Harris* and the dictum in *Simpson* have combined to spawn disorder among state appellate courts reviewing challenges similar to the one presented here. I would hope that today's holding will remedy, rather than exacerbate, the existing confusion"); *Whalen*, 100 S.Ct. at 1446 (Rehnquist, C.J., dissenting)("the *Blockburger* test, although useful in identifying statutes that define greater and lesser included offenses in the traditional sense, is less satisfactory, and perhaps even misdirected, when applied to statutes defining "compound" and "predicate" offenses").

would point out again, that these cases at best provide only guidance (or sew confusion), as since the matter is entirely one of legislative intent, and there is no "constitutionally compelled" method of determining that intent; a jurisdiction is quite free to decide the proper approach for itself. In *Ream* this Court did; there have been no additional United States Supreme Court cases beyond those discussed and applied in *Ream*, and there is no reason under principles of *stare decisis* to revisit *Ream*.[39]

5. Application of *Wilder* and *Ream* here

If *Ream* is applied to non-compound offenses, and MCL § 257.625(5) is not, as amicus believes, a compound offense, then application of both *Wilder* and *Ream* to non-compound offenses would create something of an anomaly. In *Wilder* the Court determined that as 1st-degree home invasion was charged, and given the facts, only certain alternative elements of 3rd-degree criminal sexual conduct were "in play," and so viewed, the offense was a subset of the elements of the charged 1st-degree criminal sexual conduct:

> defendant was charged with first-degree home invasion for entering the complainant's home without permission, taking property out of the home, and displaying a gun in his waistband. The trial court convicted defendant of third-degree home invasion under MCL 750.110a(4)(a) by finding that defendant entered the home without permission and committed a misdemeanor (larceny).

And this Court said that:

> Thus, we need only examine the elements of third-degree home invasion under MCL 750.110a(4)(a) to determine whether the

[39] And see *Garrett v. United States*, 471 US 773, 105 S Ct 2407, 85 L Ed 2d 764 (1985), upholding convictions for both continuing criminal enterprise, and a predicate offense, despite the elements of the predicate being subsumed in the criminal enterprise offense.

> crime, when committed in that specific manner, is a necessarily included lesser offense of the charged crime of first-degree home invasion.
>
> In the instant case, it is clear that third-degree home invasion under MCL 750.110a(4)(a) is a necessarily included lesser offense of first-degree home invasion because all the elements required to convict defendant of third-degree home invasion under that subdivision are subsumed within the elements of first-degree home invasion. . . . .as charged in this case . . . .[40]

Applying *Ream* to the same situation, and looking to the alternative elements in the aggregate—the "statutory elements"—if the offenses were charged in separate counts the defendant could be convicted and sentenced on *both*. And so in the instant case. Under *Wilder*, had the prosecution not charged defendant with two counts, the OWI offense could have been considered as an included offense, and an instruction would have been appropriate if there was an evidentiary dispute on element that distinguished the greater offense from the lesser (causing a serious impairment of body function of another person). But the prosecution *did* charge both counts, and under *Ream* conviction of both is permissible. *Wilder II*, then, serves the function of identifying lesser offenses that may be instructed upon under *Cornell*, when an offense is not separately charged in its own count, and in that way serves a notice function.

Further, even if, for offenses that are not compound offenses, *Ream* is applied to the elements "in play," in the present case there is an expressed legislative contemplation of multiple convictions in paragraph (27). Paragraph (27) provides that "If 2 or more convictions described in subsection (25) are convictions for violations arising out of the same transaction, only 1

[40] *People v. Wilder,* 485 Mich. at 45.

conviction shall be used to determine whether the person has a prior conviction." The convictions "described in subsection (25)" are:

> (b) "Prior conviction" means a conviction for any of the following, whether under a law of this state, a local ordinance substantially corresponding to a law of this state, a law of the United States substantially corresponding to a law of this state, or a law of another state substantially corresponding to a law of this state, subject to subsection (27):
>
> > (i) Except as provided in subsection (26), a violation or attempted violation of any of the following:
> >
> > (A) *This section*, except a violation of subsection (2), or a violation of any prior enactment of this section in which the defendant operated a vehicle while under the influence of intoxicating or alcoholic liquor or a controlled substance, or a combination of intoxicating or alcoholic liquor and a controlled substance, or while visibly impaired, or with an unlawful bodily alcohol content.
> >
> > (B) Section 625m. [FN6]
> >
> > (C) Former section 625b. [FN7]
> >
> > (ii) Negligent homicide, manslaughter, or murder resulting from the operation of a vehicle or an attempt to commit any of those crimes.
> >
> > (iii) Section 601d or 626(3) or (4) (emphasis supplied).

With regard to paragraph (27), the Court of Appeals found no legislative contemplation of multiple convictions under MCL § 257.625, because paragraph (25)

> includes as part of its definition of "prior conviction" a conviction from a foreign jurisdiction of a law that "substantially correspond [s] to a law of this state." MCL 257.625(25)(b). Thus, because some other jurisdictions may have chosen to explicitly impose

> multiple punishments for a single transaction, Michigan's Legislature took steps through the enactment of subsections (25) and (27) to limit how those multiple convictions are to be handled with respect to calculating a defendant's number of "prior convictions." As a result, MCL 257.625(25) and (27) do not evince a clear expression of any intent to allow Michigan to allow multiple punishments for the same offense.[41]

Amicus confesses to being somewhat flummoxed by this reasoning. The Court of Appeals is correct that paragraph (25) refers in its definition of prior conviction to convictions from foreign jurisdictions, and may be quite right that the legislature sought, where a foreign jurisdiction allows multiple convictions in situations similar to those covered by MCL § 257.625, to "limit how those multiple convictions are to be handled with respect to calculating a defendant's number of 'prior convictions.'" But handling prior convictions from foreign jurisdictions is not the whole of paragraph (25). The paragraph defines a prior conviction as a violation or attempted violation of "*this section.*" Paragraph (27) thus provides that where "two or more convictions described in subsection (25)"—that is, two or more convictions for violation or attempted violation of MCL § 257.625 ("this section")—are "convictions for violations arising out of the same transaction," then "only 1 conviction shall be used to determine whether the person has a prior conviction." Paragraph (27) plainly contemplates multiple convictions under MCL § 257.625 arising out of the same transaction, and provides how they are to be treated in future cases (as "1 conviction"). Whether, then, *Ream* is applied to the statutory elements in the aggregate, or the particular elements in play as the case was charged, multiple convictions are permissible, as not being beyond the authorization of the legislature.

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[41] *People v. Miller*, 2014 WL 953603, 4 (Mich.App.,2014)

C. Prior Convictions Are Not Elements

This Court has also asked "whether the existence of prior convictions under MCL § 257.625(9)(c) amounts to an element of OWI causing serious injury for purposes of the state and federal Double Jeopardy Clauses." Punishment for "OWI" is enhanced based on prior convictions under paragraph (9)(c). But whether the OWI under MCL § 257.625(1) has enhanced punishment under paragraph (9)(c) is irrelevant to a charge under MCL § 257.625(5). Any violation of paragraph (1), be it a first offense or repeat offense, that causes a serious impairment of a body function of another person, constitutes a violation of paragraph (5). And so proof of a prior conviction is not necessary for conviction of an offense under paragraph (5), even where defendant *has* prior convictions.[42] Whether defendant may receive an enhanced sentence under paragraph (1) as a repeat offender under paragraph (9) in the manner provided by the statute under paragraph (17)—that is, by establishing the prior convictions at sentencing in the manner provided by paragraph (17)—is not before the Court, but amicus agrees with the parties that prior convictions are not elements and need not be found by a jury, and punishment may be enhanced based on establishment of the prior convictions at sentencing.

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[42] Paragraph (5)(b) allows for an enhanced sentence where two circumstances coalesce—where the person has an alcohol content of 0.17 grams or more per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine, and within 7 years of a prior conviction." In this circumstance, under current United States Supreme Court authority as explained in the People's brief, proof of the alcohol content would be an element, but proof of the prior conviction would not. And the defendant here was not charged or sentenced under (5)(b). See Peoples Appendix, 8a and 16a.

Relief

Wherefore, amicus respectfully requesst that this Court reverse the Court of Appeals.

Respectfully submitted,

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